December 20, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements; WC Docket No. 04-405

Dear Ms. Dortch:

Attached are comments of the Association for Local Telecommunications Services ("ALTS") for filing in the above-captioned proceeding.

Sincerely,

/s/

Teresa K. Gaugler

888 17th Street, NW • Suite 900 • Washington D.C. 20006 • Telephone: 202 969 2587 • Fax: 202 969 2581

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
In the Matter of Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements	)	WC Docket No. 04-405

COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its comments in the above-referenced proceeding in response to the Commission's Public Notice[1] regarding BellSouth's Petition requesting regulatory relief for its broadband transmission facilities.[2] This petition is another in the flood of petitions recently filed by the ILECs to pressure the Commission into prejudging pending rulemaking proceedings in which it is already squarely considering the appropriate regulatory treatment for wireline broadband services. In the instant proceeding, BellSouth asks the Commission to remove regulations that, if granted, would stifle the deployment of nascent broadband Internet access services, and in particular, would throttle the competitive deployment of innovative Voice over Internet Protocol (VoIP) services. The Commission should not yield to this pressure but should continue with its deliberation in those rulemaking proceedings where a complete record has been developed. ALTS has opposed

[1] *Pleading Cycle Established for Comments on Petition of the BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, Public Notice, WC Docket No. 04-405 (rel. Nov. 3, 2004).

[2] Petition of the BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements; WC Docket No. 04-405 (filed October 27, 2004) ("BellSouth Petition").

deregulation of the ILEC's broadband transmission services in those proceedings and hopes the Commission will continue to foster wireline broadband competition by maintaining appropriate regulation of ILEC transmission facilities.

I. The Commission Should Not Grant BellSouth Forbearance Relief Before It Considers Its Pending Rulemaking Proceedings Addressing Regulatory Treatment of Broadband Transmission Facilities.

In its petition, BellSouth seeks forbearance from (1) *Computer Inquiry* requirements that compel ILECs to tariff and offer the transport component of their broadband services on a stand-alone basis and to take service itself under those same terms and conditions, and (2) all Title II common-carriage requirements that might otherwise apply to ILEC broadband transmission.[3] These are not new issues or arguments being raised in this petition, but are issues the Commission is already deliberating in pending rulemaking proceedings. Those are the most appropriate proceedings for considering these issues, and these duplicative ILEC forbearance petitions merely waste Commission and industry resources required to respond repeatedly to the same ineffective ILEC arguments.

In its *Broadband NPRM*,[4] the Commission is considering the statutory classification of wireline Internet access services and the appropriate regulatory framework for those services. Specifically, the Commission is considering whether those services are "telecommunications services" or "information services" under the Telecom Act. The Commission tentatively concluded that "when an entity provides wireline broadband Internet access service over its own transmission facilities, [it] is an information service under the Act [and] … that the transmission

[3] BellSouth Petition at 1.

[4] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002) ("Broadband NPRM").

component of retail wireline broadband Internet access service provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service.'"[5] In focusing on the definition of these services, the Commission is contemplating to what extent the ILECs should be subject to common carrier regulations for their broadband transmission services. In the *ILEC Non-Dominance NPRM*, the Commission is also considering the appropriate regulatory treatment of the ILECs' retail broadband services to the extent that they are determined non-dominant providers of those services.[6] The records in those proceedings highlight the flaws in the Commission's rationale for contemplating such relief, and ALTS sincerely hopes that the Commission will reconsider its proposals and maintain both *Computer II* and Title II regulation of ILEC broadband transmission facilities.

II. The Commission's *Cable Modem Decision* Is Not Dispositive Over Regulation of Wireline Broadband Services.

In its petition, BellSouth insinuates that there is no need for the Commission to engage in any thoughtful analysis in its pending rulemaking proceedings regarding wireline broadband services, since it has already determined in its *Cable Modem Decision* that Internet access service provided over cable modem is an "information service" not subject to common carrier regulation.[7] While the Commission described the *Broadband NPRM* as the "functional equivalent" of the *Cable Modem NOI*,[8] the *Cable Modem Decision* should in no way prejudice the Commission's decision in the *Broadband* proceeding. As described below, there are

[5] Broadband NPRM ¶ 17.

[6] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, CC Docket No 01-337 (2002) ("ILEC Non-Dominance NPRM") .

[7] BellSouth Petition at 13.

[8] Broadband NPRM ¶ 9.

significant differences between wireline and cable modem services that justify disparate regulatory treatment. Moreover, reliance on the *Cable Modem Decision* is unfounded after the Ninth Circuit overturned the Commission's classification of cable modem service as exclusively an information service and the Supreme Court has granted certiorari to consider the case.[9] Specifically, the Ninth Circuit found that cable modem service has both information service and telecommunications service components.[10] Thus, the status of the regulatory treatment of cable modem broadband service is itself uncertain, and BellSouth's reliance on the Commission's decision in the *Cable Modem Decision* is misplaced. More importantly, the Commission cannot address via forbearance matters that could, if the Commission prevails before the Supreme Court, be remanded to the Commission for further action on remand.

In their ongoing push to gain deregulation of their broadband services, the ILECs conveniently choose to ignore the fact that the cable and wireline broadband serve different consumers.[11] Cable primarily serves residential customers, and wireline serves small and large businesses. Regulatory treatment of one should not drive the other. Only in the residential broadband market does cable modem service provide an alternative to ILEC retail services. But in this duopoly market, the ILEC and cable modem provider exercise significant market power. There is no third choice. The inadequacy of a facilities duopoly for ensuring consumer choice is not seriously disputed, even by the ILECs. In fact, the *Cable Modem Decision* explicitly chose

[9] *Brand X Internet Svcs v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[10] *Id.*

[11] *See* ALTS Reply Comments on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 16 (filed July 1, 2002).

not to address the role of cable-based broadband services in business markets[12] – the market largely served by wireline providers. Thus, by its own terms, the Commission's *Cable Modem Decision* addressed an entirely different market with its own unique characteristics.

Moreover, the historical differences between cable and wireline deployment require different regulatory treatment by virtue of statutory imposition of difference regulatory regimes.[13] The telephone network was funded by ratepayer dollars under a governmentally sanctioned monopoly, while the cable broadband network was largely built on risk capital. Statutory and historical differences, as well as differences in network architecture, ubiquity of facilities coverage and market coverage, fully explain the Congressional requirement that telecommunications and cable services be differently regulated. Thus, a long history and a reasoned basis support differing regulatory treatment of cable and wireline systems, and nothing in the record demonstrates any legitimate justification for the Commission to converge these regulatory structures.

As a result of these different histories, while the telephone network was built to provide access to an unlimited number of enhanced service providers and voice customers alike, cable systems have traditionally been closed, used to carry only the cable companies' video services.[14] Accordingly, unlike wireline facilities, in a cable system, the FCC has concluded, "the multiple-ISP environment requires a re-thinking of many technical, operational and financial issues,

---

[12] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other* Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, ¶ 1, n. 5 ("Cable Modem Decision").

[13] *See* ALTS Reply Comments on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 17-8 (filed July 1, 2002).

[14] *See* Joint Reply Comments of WorldCom, CompTel, and ALTS on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 27-28 (filed July 1, 2002).

including implementation of routing techniques to accommodate multiple ISPs."[15] Whatever the merits of that conclusion, it was an important predicate to the Commission's cable ruling, and it does not apply here. No "re-thinking" is required to maintain the status quo on the wireline side. In sum, there are compelling reasons to continue to regulate wireline broadband service providers as common carriers, regardless of how providers of cable modem service are categorized.

The cornerstone of BellSouth's request here (along with the other similar ILEC forbearance petitions) is its assertion of a need for regulatory parity between cable and wireline broadband providers, which it appears to justify by any means necessary, even the elimination of competition in the wireline market. However, the Commission should not and cannot endorse a sweeping reversal of precedent and policy in the name of regulatory parity without a substantive competitive analysis of the effect of such a move on wireline broadband competition. Furthermore, BellSouth notes that during the first half of 2004, cable and DSL each added 2 million new subscribers,[16] thus the recent level of growth in cable modem and DSL services is parallel despite the so-called gap in regulatory treatment of those services.

III. Forbearance from Computer Inquiry and Title II Requirements to ILEC Broadband Transmission Services is Not in the Public Interest.

BellSouth contends that it is not a dominant carrier in the provision of broadband services,[17] while ignoring its ongoing dominant status as a wireline wholesale and retail provider. BellSouth argues that the broadband market is suitably competitive to curb any anticompetitive

[15] Cable Modem Decision ¶ 29.

[16] BellSouth Petition at 9.

[17] *Id.* at 29.

behavior by the ILECs;[18] however, its data refer solely to the retail broadband market, not the wholesale market for underlying wireline facilities. There is no question that BellSouth has market power in the provision of transmission facilities for wireline broadband services. Furthermore, BellSouth has an incentive to abuse its market power to disadvantage broadband rivals, by charging higher prices to rivals for essential inputs, providing rivals with poor quality interconnection, or imposing unnecessary delays.

Like similar ILEC forbearance petitions, BellSouth cites "intermodal" competition from cable modem providers as a sufficient safeguard in the absence of regulation.[19] When the Bells purport to provide a competitive justification for the results they seek, they conjure up a foggy state of "intermodal" competition. But they never come to grips with the mandate of the 1996 Act to promote *wireline* intramodal competition to ILECs. Equally importantly, the Bells never adequately define the markets in which the effects of "intermodal competition" will supposedly be felt or properly assess the market power they will retain if their wishes come true. This failure to conduct a proper competitive analysis is not surprising, because it is clear that the actions the Bells have in mind will leave them with market power in all markets and clear monopoly status with respect to significant classes of consumers.[20]

Again and again, the ILECs point to competition in the retail market to justify deregulation of their wholesale services, when such a direct correlation between those markets simply does not exist. In this case, it is questionable whether intermodal competition from cable

[18] *Id.* at 6.

[19] BellSouth Petition at 31.

[20] *See* ALTS Reply Comments on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 3-4 (filed July 1, 2002).

modem providers would discipline ILEC anti-competitive behavior in the *retail* market without regulatory safeguards, but it would certainly not discipline the ILECs' anticompetitive behavior in the *wholesale* market for last-mile bottleneck facilities, where the ILECs maintain a monopoly. The ILECs do have market power in the wireline market, for both retail and wholesale DSL services, and they would be one of two broadband providers in the overall broadband market if all competitors are eliminated except cable modem providers. ILECs have every incentive to abuse that market power to the disadvantage of their competitors, which include CLECs and ISPs.

The broadband market has greatly benefited from the ISPs' ability to gain access to ILEC transmission facilities, and consumers would be harmed without such nondiscriminatory access. BellSouth argues that it would continue to have incentive to negotiate with ISPs for access to its network and highlights that it "might seek to negotiate private-carriage arrangements that would be tailored to the unique circumstances of particular ISPs."[21] With BellSouth's use of the word "might," it makes no commitment to negotiate, and there should be concern that those "unique" arrangements, if they were negotiated, would not necessarily be nondiscriminatory. In particular, given the Commission's recent actions limiting CLEC access to loop and transport facilities, VoIP providers and other ISPs that are not affiliated with BellSouth will have no means of getting to the end user. Thus, should the Commission provide BellSouth with the relief requested in this proceeding, BellSouth will have the instant ability to shut off access to nonaffiliated VoIP providers, decimating a nascent industry that would otherwise bring low cost, innovative new services to consumers and small businesses.

[21] BellSouth Petition 28.

As ALTS has noted repeatedly in its pleadings, if the Commission eliminates UNE access for intramodal competitors, it would create a virtual duopoly for residential broadband services, and a monopoly for small/medium business broadband services, which would be harmful to competition and consumers. BellSouth states that "'competition,' not unnecessary and asymmetrical regulation, [] is the 'most effective means of ensuring that the charges, practices, classifications, and regulations' offered by broadband providers are 'just and reasonable, and not unjustly and unreasonably discriminatory.'"[22] ALTS agrees that full-fledged competition is more effective in restraining anticompetitive behavior; however, a duopoly between the cable modem providers and the ILECs does not provide such a level of competition, and deregulation of the monopoly-owned wireline broadband transmission facilities would not be in the public interest. The Commission has "been highly skeptical of mergers that would lead to a duopoly, and the courts have found that mergers to duopoly are generally unacceptable."[23] The Commission has already dramatically reduced or in some cases eliminated CLEC access to fiber facilities used to provide competitive broadband services, thereby granting the ILECs opportunity to gain even greater market power for these services, which clearly conflicts with the Commission's policy not to support monopolies in the marketplace. In the recently adopted Triennial Review remand proceeding, the Commission further restricted competitive carrier access to bottleneck loop and transport facilities, thereby returning more monopoly territory to the ILECs. In the instant proceeding, the Commission must ensure that it does not further erode CLEC access to underlying transmission facilities to competitive broadband services.

[22] BellSouth Petition at 31 (citing *Directory Assistance Order*, 14 FCC Rcd at 16270, ¶ 31).

[23] In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, Statement Of FCC Commissioner Michael J. Copps (Approving In Part, Dissenting In Part), FCC 04-255, at 2 (2004) ("Copps Statement").
(continued….)

BellSouth argues that the cost of complying with regulatory requirements is too high and reduces ILEC incentive to deploy facilities and introduce new innovative services.[24] BellSouth fails to explain, however, how the freedom from unbundling obligations for broadband facilities that have been recently granted to BellSouth and other ILECs is insufficient incentive to deploy such facilities and new services. In the Triennial Review proceeding, the Commission completely exempted ILECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.[25] The Commission completely exempted ILECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both newbuild and overbuild situations.[26] Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,[27] and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.[28] Furthermore, the Commission purports to eliminate a significant amount of additional transport and loop facilities from unbundling requirements in its recently adopted *Triennial Review Remand Orde*r.[29] In sum, the Commission's *Triennial Review* proceeding already provides the ILECs with a staggering amount of deregulation for both mass market and enterprise loop facilities. It is unclear why any additional relief is necessary to provide incentive for ILEC investment.

---

[24] BellSouth Petition at 5.

[25] *See* Triennial Review Order ¶¶ 285-297.

[26] *See* i*d.* ¶¶ 273-284.

[27] *See* i*d.* ¶¶ 535-541.

[28] *See id.* ¶¶ 298-342.

IV. Increased Competition, Not Widespread Deregulation, Is The Best Method To Spur Innovation And Further Deployment In An Industry Where Monopoly Providers Control Bottleneck Facilities.

The Commission seeks to "best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation."[30] ALTS shares these goals and believes the best public policy is to encourage deployment of broadband services by continuing to foster both intermodal and intramodal facilities-based competition. Widespread deregulation will not guarantee additional broadband deployment, but increased competition provides proper incentives for all carriers. Multiple firms trying different strategies are far more likely than a monopoly to produce innovative products. A fundamental underpinning of the 1996 Act is that competition among service providers is the surest means of ensuring the availability to consumers of an array of telecommunications services at reasonable prices. Competitive local exchange companies have invested over $70 billion in constructing new broadband telecommunications networks since the passage of the Telecommunications Act in 1996. The CLECs were the first companies to introduce DSL into the marketplace and developed many other innovative technologies based upon the unbundling rules set out to enforce the Act. The best way to advance the deployment of broadband technologies is to enforce the current policies that promote facilities-based competition.

When Congress adopted the Telecommunications Act of 1996, it set forth a number of objectives. One provision, section 706, assigned responsibility to the FCC and "to each state

---

[29] *FCC Adopts New Rules For Network Unbundling Obligations Of Incumbent Local Phone Carriers*, Public Notice, WC Docket No. 04-313 and CC Docket No. 01-338 (rel. Dec. 15, 2004).

[30] ILEC Non-Dominance NPRM ¶ 4.

Commission with regulatory jurisdiction over telecommunications services" to "encourage" the "reasonable and timely" deployment of "advanced telecommunications capability to all Americans." Inexplicably, the Commission has elevated this one statutory objective above all others, describing "the Commission's primary policy goal to encourage the ubiquitous availability of broadband to all Americans."[31] Even if the Bells' proposals would achieve this objective (which they would not), the Commission cannot ignore the plain language of the statute.[32]

Merely deregulating the ILECs would not provide incentive for them to deploy better broadband services to more consumers. The ILECs have already shown their propensity to behave like monopolists because they suffer no consequences. And the ILECs continue to dominate the market for DSL-based services regardless of their position *vis a vis* the cable modem providers. Deregulation of ILEC facilities would create, at best, a duopoly in the residential broadband market. Exempting the ILECs from opening their markets to competitors would destroy the new entrepreneurial competitive telecom companies and, at best, leave consumers with just two choices – the ILEC or the cable modem provider. This would create a duopoly, not widespread competition. Furthermore, deregulating ILECs for broadband services would grant them a virtual monopoly in the non-residential market because business customers do not have access to cable modem providers.

Whatever the Commission does in its rulemaking proceedings must be supported by a careful analysis of whether and how an action will benefit consumers. Requiring the ILECs to

[31] *Broadband NPRM* ¶ 4.

[32] *See* ALTS Reply Comments on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 8 (filed July 1, 2002).

comply with existing statutory and regulatory obligations that ensure robustly competitive Internet access – including access to VoIP services -- will result in great consumer benefits for both ILEC and cable customers.[33] Spurred by cable and CLEC deployment, the ILECs have been actively deploying facilities to provide Internet access services, notwithstanding the alleged "burdens" imposed by the current regulatory regime. The ILECs' ubiquitous loop plant is their most valuable asset. As shown by their actions, they have powerful incentive to upgrade that plant to respond to competitive pressures. The real risk to "broadband" deployment would come by granting the ILECs the unrestrained ability to exercise their market power.

CONCLUSION

For the foregoing reasons, ALTS urges the Commission to reject BellSouth's forbearance petition. The Commission should instead focus on its rulemaking decisions that consider the appropriate regulatory treatment of broadband services and should grant regulatory relief where appropriate for retail service offerings only after careful consideration of the records in those proceedings.

Respectfully Submitted,

Association for Local Telecommunications Services

By: /s/_____

Jason D. Oxman, General Counsel
Teresa K. Gaugler, Assistant General Counsel

[33] *See* Joint Reply Comments of WorldCom, CompTel, and ALTS on *Broadband NPRM*, CC Docket Nos. 02-33, 95-20, 98-10, at 25-26 (filed July 1, 2002).

888 17th Street, NW, Suite 1200
Washington, DC 20006
(202) 969-2587

December 20, 2004